IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 220 of 1982

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

LAKHUBHAI NAGBHAI

Versus

KHARA PATEL & CO

Appearance:

MR SURESH M SHAH for Appellants.

MR BH MEHTA for Respondent.

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 15/09/2000

ORAL JUDGEMENT

Regular Civil Suit No. 160 of 1977 for the recovery of Rs. 3,501/- together with interest and costs instituted by respondent-plaintiff in the Court of the Civil Judge (S.D.) at Amreli came to be dismissed with costs on 17th February 1982. Regular Civil Appeal No. 46 of 1981 then filed in the District Court at Amreli and assigned to the then learned Additional Sessions Judge at Amreli came to be allowed on 30th April 1982 whereby decree passed by the learned Civil Judge was reversed,

and decree, directing the appellants-original defendants to pay jointly and severally the sum of Rs. 3501/together with interest thereon at the rate of 6% p.a. from the date of the suit till realisation with no order as to costs, came to be passed. Being aggrieved by such judgment and decree in appeal, the appellants, have filed this Second Appeal.

2. The facts, which led the appellants to prefer this appeal, briefly stated are that the respondent is a registered partnership firm and deals in oil engines, electric motors, machineries and spare-parts etc. The appellants are the friends. The respondent as alleged in the plaint had advanced the amount of Rs. 3,501/- in cash to appellant No.1. A writing to that effect was executed by the appellant No.1. The appellant No.2 stood as surety. The amounts advanced were to be returned by the appellants on or before Sud-15 Magshirsh S.Y. 2032 (18th December 1975). The appellants as agreed in writing did not within the time fixed make the payment. The respondent then often demanded the amounts but the appellants paid no heed and avoided to pay. The respondent was then constrained to file the suit being Regular Civil Suit No. 160 of 1977 in the Court of the Civil Judge (S.D.) at Amreli for the recovery of Rs. 3,501/=the principal amount and Rs. 651/- the amount of interest, in all Rs. 4,152/=together with interest at the rate of 12% p.a. from 18th December 1975 to 30th June 1977 and also the future interest thereon, from the date of the suit.

3. The appellant No.1 appeared before the lower Court and filed the written statement at Ex.16 contending inter alia that the suit was false. The respondent firm was not registered. He never took the loan of Rs. 3,501/- and did not execute any writing promising to pay the amount back on or before Sud-15 Magshirsh S.Y. 2032(18th Dec. 1975). As he had not taken the loan no question of demanding the same often arose for the respondent. The respondent was having no money lending licence. The appellant No.2 was financially sound. If at all he wanted to have any help, he could have taken the money from the appellant No.2. There was therefore no need to go to the respondent for the loan. The alleged writing produced was the promissory note and the same being insufficiently stamped was inadmissible in evidence. The suit filed on the basis of that promissory note was therefore not tenable.

4. The appellant No.2 filed the written statement at Ex. 14 advancing the case that the suit was false and

the case pleaded in the plaint was not admitted. He was not knowing the respondent. The respondent is not the registered partnership firm. The appellant No.1 did not borrow Rs. 3,501/-, and he did not stand as surety. The writing in question did not bear his signature. It is insufficiently stamped. The suit based thereon was not tenable. As per the information he was having the appellant No.1 had purchased oil engine and spare-parts from the respondent on credit in past. He, on inquiry being made from the respondent certified the appellant No.1 to be the dependable & upright person on whom trust could be reposed, making it clear that there should be no baulk at, if the goods were sold on credit to the appellant No.1, but he did not stand as surety. Hence he was not liable to pay the amount to the respondent. He was in the circumstances neither necessary nor the proper party to the suit.

5. The then learned Civil Judge (S.D.) then framed necessary issues at Ex. 17. He held that the respondent firm was duly registered as per law but the case about the loan was not established. He therefore dismissed the suit. The learned Judge, perusing the evidence led before him, concluded that the respondent had in fact not paid Rs. 3,501/- in cash to the appellant No.1 because in that regard clarificatory statements were made by the respondent's partner in his evidence recorded at Ex. 52. From his evidence it was clear that in past the machine and articles were sold to the appellant No.1 on credit and the amounts thereof were due. He therefore held that the respondent averred in the plaint on the basis of the facts stated in the writing Ex. 80, but in fact no such amount was advanced and therefore there was variance between the pleadings and the proof. As the new case developed at the time of hearing was clearly in departure of the case pleaded, decree was required to be refused, and accordingly the then learned Civil Judge dismissed the suit.

6. Being aggrieved by such judgment and decree, Regular Civil Appeal No. 46 of 1981 came to be filed in the District Court at Amreli. The then learned Assistant Judge at Amreli, who was assigned with the appeal for hearing and disposal in accordance with law, allowed the appeal, set aside the judgment and decree passed by the lower Court and passed the decree as prayed for, holding that there was in fact no variance between the pleadings and the proof. The learned Civil Judge (S.D.) had fallen into error in holding that there was a departure from the case pleaded in the plaint and a new case was sought to be introduced by the respondent. Relying on some of the

decisions, the learned Assistant Judge reached the conclusion that from time to time the creditors relating to the past transaction as per the practice in the society go on getting the writings from the debtors executed mentioning that the sums were advanced on that day though the reality may be otherwise. The practice is not unknown but it is a matter of common knowledge, and ordinary course of transaction which has been judicially recognised. Even if the consideration was paid in past, and thereafter periodically different writings settling the accounts were got executed indicating that amounts in cash were paid, it would not amount to departure from the pleadings or introduction of a new case when on the strength of the last writing the suit is filed.

7. Being aggrieved by such judgment and decree, this Second Appeal is filed calling in question the legality and validity of the decree passed by the learned Assistant Judge, Amreli, raising the plea that it was legally not permissible to the learned Assistant Judge to hold that there was in fact no variance between the pleadings and the proof. The learned Assistant Judge also failed to note that after the partner of the firm deposed before the trial court, an application for amendment in the plaint was filed so as to bring on record how in past the parties were having the dealings and under what circumstances the last writing Ex. 80 (suit writing) held to be the bond and not the promissory note came to be executed. The lower court rejected the application and refused to grant the amendment sought for. The revision application before this Court was preferred by the respondent but during the course of the hearing that revision application was withdrawn. In view of the fact, when the amendment sought for was not allowed, the learned Assistant Judge ought to have held that there was variance between the case pleaded initially about the loan and the proof about past transactions of the sale of goods on credit, and therefore on that ground the appeal was liable to be dismissed. In this Second Appeal, therefore, the substantial question of law which is raised for consideration is whether there is really the departure from the case initially pleaded in plaint, and the decree can be said to have been passed on the proof of a new case developed later on without getting the plaint amended, as a result of which the decree is bad in law.

8. The learned advocate representing the appellants has vehemently submitted that there was variance between the pleadings and the proof the learned C.J. (S.D.) was right in that regard, but the ld. Assistant Judge who

allowed the appeal fell into error. In this regard, it may be stated that the learned Assistant Judge at Amreli has in his judgment referring different case laws elaborately discussed the facts and law and has rightly reached the conclusion that there was in fact no departure from the pleadings. When I am in general agreement with the learned Assistant Judge, it is not necessary to restate his reasonings as well as the decisions he has cited. Suffice it to say that the learned Assistant Judge has made no mistake in holding that there is in fact no variance as alleged and the learned Civil Judge (S.D.) in that regard fell into error, by refusing to pass decree.

9. It is the general practice in money market and in respect of the commercial transactions, that if the goods are initially sold on credit or amounts are paid by way of loan and the amounts are not paid within the time specified or within reasonable time, the seller of the goods or the person advancing the loan would get a new writing executed from the debtor. Although in fact on the day of that fresh writing sums are/were not paid in cash, the writing would be to the effect that the amounts were paid in cash; and in succession accordingly on failure to make payment back the writings are got executed even if the claim has become time barred. Such recognition of the practice is reflected in Sec. 25(3) of the Indian Contract Act which permits execution of even time-barred debt and passing of the decree if the suit is filed within time from the date of the writing or failure to pay on the specified time as per the agreement as the case may be. Keeping Section 25(3) of the Contract Act in mind the creditor instead of taking the legal action when accordingly gets the fresh writing executed from the debtor; and on the basis of the last writing even without referring the chequered history if the suit is filed for the recovery of the amount, and at the time of hearing the chequered history is stated, just to explain how the suit writing came into being, the same would not amount to variance between the pleadings and the proof as held by the learned Civil Judge (S.D.). In fact as held by the learned Assistant Judge it would not amount to variance and for such view the learned Assistant Judge has rightly placed the reliance on the decision of the Bombay High Court in the case of Kasturchand Jivaji vs. Manekchand Devchand - AIR 1943 Bombay 447.

10. In view of such law, in the case on hand, if the writing Ex.80 is got executed with regard to the earlier transaction the suit filed on the basis of the last

writing and evidence led at the time of hearing referring the past transacction and producing the account books thereon just for explanatory purpose it would not amount to departure from the pleadings as contended by the learned advocate representing the appellants.

11. It may however be stated that the appellant No.2 has pleaded the case of sale of goods of credit stating that as per the information he was having the appellant No.1 had purchased oil engine on credit and in that regard respondent had made inquiry about trustworthiness of appellant No.1, but has shrewdly remained silent about his becoming the surety. In this regard at the time of hearing necessary questions are put to the parties and respondent also brought the books of accounts in the Court. The parties have thus gone to the trial knowing well about the sale of goods on credit and by passage of time pronote was got executed. No one is therefore prejudiced or taken up by surprise. The learned Asstt. Judge has rightly dealt with this aspect in details and so it is not necessary to discuss in details repeating what the ld. Asstt. Judge has done. When that is so, technical rule need not be enforced. No other question of law is raised. On the question raised, the appellant fails.

12. Of course as stated above, the amendment sought for amending the pleadings was not allowed, but that cannot help the appellants. The appellant No. 2 has in his written statement betrayed about the transaction in past which was in respect of sale of goods on credit. To have detailed clarification or elucidation, amendment was sought. It was not for getting the new case, introduced not at all covered even cursorily by the pleadings of the parties initially. As appellant No.2 had pleaded the case shrewdly, necessary questions were put and books of accounts were also brought to the Court. The parties accordingly knowing fully well about the transaction in past have gone to the trial. It was not the new case but the cryptic or hazy case pleaded by appellant No.2 was well in mind of all when all went to trial. The appellants therefore cannot take advantage under the guise that there is departure from the pleadings and they were taken up by surprise; and refusal to allow the amendment was fatal to the respondent.

13. In view of the fact, there is no reason to interfere with the judgment and decree passed by the learned Assistant Judge. The same being quite in consonance with the law are required to be maintained. In the result, the appeal fails and is hereby dismissed

with no order as to costs.
rmr. ======